

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

NO. 77-7027

UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

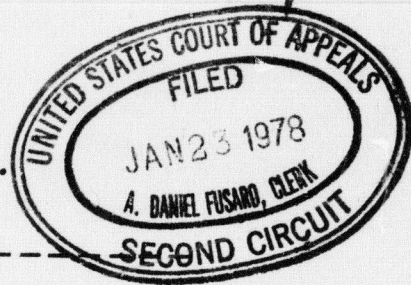
JAMES D. MCMILLEN,

Plaintiff-Appellant,

vs

LOUIS J. LEFKOWITZ, et al,

Defendant-Appellee.



ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF
JAMES D. MCMILLEN
APPELLANT

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AND
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Preliminary Statement

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Before this Court is an appeal which largely centers around two basic questions:

1. As to trial conduct "procedurally", was plaintiff afforded a fair trial?
2. Was the implementation of a directed verdict consistent with the rules governing its application?

It is in examining the above two questions that the issues raised in Appellant's Brief each remain viable, and represent moving and compelling justification to reverse the directed verdict of the lower court, and return the matter to the District Court for a new trial by jury on the issues of plaintiff's case.

Trial Conduct and Procedure

Trial Conduct and Procedure

In Appellee's Brief, defendant totally and completely ignores the irregularities and improprieties which occurred in and through the trial. These departures from acceptable court procedure were manifold, serious, and resulted in a loss of the right of the plaintiff to a fair trial. Briefly enumerated, they are as follows:

I

WANTON DISREGARD BY DEFENDANT OF THE COURT'S ORDER CALLING FOR SEPARATION OF WITNESSES.

1. It should be stressed that plaintiff's motion for the separation of witnesses was not "routinely", "perfunctorily", or "automatically" granted. Rather, considerable discussion occurred concerning it. Plaintiff made his need for it abundantly clear. (See transcript, Page 36, line 10, through page 37 line 9.)

2. All of the defendant's witnesses, knowingly violated the court's order. (See transcript, Page 497, line 5 through Page 498, line 13.)

3. The Court "acknowledged" that the actions of the witnesses were in violation of the Court's Order. (See transcript Page 498, line 4 through 13.)

4. The violation of the Court's Order was in itself, indicative of "bad faith". It should be noted that, of the three witnesses, two were licensed practicing attorneys, members of the New York Department of Law, and the third was a Senior Law Department Investigator with the New York Department of Law. Accordingly, all of them were more than familiar with Courtroom procedures. Both defendant's counsel and the three witnesses "jointly" share the responsibility for a purposeful and contrived attempt to subvert plaintiff's entitlement to proper court procedures and a fair trial.

5. The above purposeful act to subvert a fair trial was especially crucial due to the fact that the only witnesses for the defendant then proceeded, "after listening to plaintiff's testimony" to allege a defense of "good faith belief". On the heels of such a gross and purposeful act to subvert a trial by three lawyers and one senior law department investigator, it is beyond logic that these persons could then become the basis of a so-called "good faith belief" defense.

II

UNETHICAL AND PREJUDICIAL CONDUCT BETWEEN THE COURT AND DEFENDANT'S COUNSEL.

An inspection of the record will indicate that somehow, and in some way, counsel for defendant did independently deliver to Judge Foldy, on November 19, 1976 (during trial), a copy of a decision of State Justice Staley. (See Index of Northern District Court, (Page 23) and Supplemental Record, entry of item #9). Inspection of the document will reveal that it was not filed with the Clerk first, but rather was given to Judge Foley; who subsequently in his own handwriting directed the Clerk to file it as a pleading. All of the above was done without the knowledge of the plaintiff. It was only upon inspecting the record transmitted to the U.S. Second Circuit, that plaintiff became aware that this unethical act had taken place. The above action seriously subverted a fair trial in the following ways:

1. It is not a pleading to this case and should not have been accepted or filed as one.
2. The secrecy through which it was given to Judge Foley precluded plaintiffs ability to combat or refute it.
3. Its content was highly damaging to the plaintiff personally.

4. Independent consideration of it by the Court, without judicial reason, and without knowledge of the plaintiff, was an unethical practice, exceeding proper judicial discretion and again, deprived plaintiff of a fair trial.

(Note: Examination of the Staley decision will indicate that it constituted in large measure, a character evaluation of this plaintiff. Additionally, it was damaging. Moreover, its presence as a pleading in this case was without justification. Appellant herein submits that the counsel for defendant sought to secretly transmit the opinion of Justice Staley to Judge Foley, so as to mold an attitude toward the plaintiff that the Attorney General was "justified" in his actions, and thus attempt to establish a prevailing mood receptive and favorable to a "good faith belief" defense.)

III

THE COURT DENIED PLAINTIFF REASONABLE OPPORTUNITY TO PRESENT REBUTTAL WITNESS.

1. In the course of defendant's presentation of his witnesses, testimony was given concerning certain alleged dealings of the plaintiff and the Arthritis Foundation. This testimony was unexpected by plaintiff. Moreover, there was a person then in the courtroom who could offer rebuttal testimony and evidence to controvert the statements of defendant's witness.

2. Immediately upon hearing the beginning of statements concerning the Arthritis Foundation, plaintiff instructed the potential

rebuttal witness to "leave the courtroom" and to go to the Motel at which he was staying to gather certain material and letters in his possession.

3. Upon conclusion of defendant's proof, the court asked if plaintiff had any rebuttal witnesses. Plaintiff indicated that he did and explained the circumstances and nature of the anticipated testimony. (See transcript Page 589).

4. Realizing that the witness was "in transit" from a local motel, plaintiff requested a short recess. The court granted a "ten minute recess". (See transcript, Page 590)

5. The Court did acknowledge the appropriateness of the intended testimony as a rebuttal witness. (See transcript, Page 590, line 13 - 16).

6. At the end of ten minutes, the court compelled plaintiff to go forward and rest his case without the witness because he had not yet arrived. (See transcript Page 590, line 24, through 591, line 11.)

7. Plaintiff herein submits that the limits of a ten minute recess was unreasonable. It was indicated that the witness was then enroute to the court from a local motel. Accordingly, a fair and reasonable time should have been afforded plaintiff to present his witness.

IV

THE ORCHESTRATED ATTEMPT TO HAVE
PLAINTIFF CRIMINALLY ARRESTED AMIDST
AND DURING TRIAL WAS DEVASTATING
AND PREJUDICIAL.

1. An examination of the trial transcript, beginning on page 95, line 7, through page 97, line 12, will reveal one of the most devious and unconscionable attempts to disrupt and prevent a plaintiff from effectively presenting a case that can be imagined. This portion of the transcript is herein quoted:

"THE COURT: You may step down. I think we've been an hour and a half, and we'll take an afternoon recess. We'll stay the session, but I'll excuse the Jurors for 15 minutes or so. Have you very much? I don't know, Mr. Dales, what happened when you came in through the Courtroom door. My law clerk was telling me that a Trooper was outside with an arrest warrant for Mr. McMillen. Now, that grandstand play should not take place.

MR. DALES: I have no knowledge of that.

THE COURT: I said that I wasn't going to let the Trooper come into the Court, and interfere with the proceedings. He can serve him at night, if he wants to.

MR. DALES: I don't know anything about that.

THE COURT: You ought to look at this warrant.

MR. DALES: I don't know anything about it.

THE COURT: I think you ought to talk to the Trooper.

MR. DALES: Your Honor, if the Trooper has been issued a warrant to arrest this man, I can't - -

THE COURT: You want him to arrest this man in front of this Jury? If you do, is the Attorney General counsel to that?

MR. DALES: We are not counsel to the Troopers. The Troopers have their own counsel, and --

THE COURT: Well, it originated with the State.

MR. DALES: Well I beg to differ with the Court. I agree - -

THE COURT: It's bad judgment.

MR. DALES: I don't think the warrant should be executed in the Courthouse.

THE COURT: No, it shouldn't. Tell him he can't execute that here.

MR. DALES: I agree with you, and I think it would be cause for a mistrial.

THE COURT: Not mistrial, it might be cause for something worse. Tell him he can't do it. He should know better than to try to come into a Federal Court trial and try to serve an arrest warrant.

All right, stand to recess for fifteen minutes."

2. Plaintiff herein submits that the experience above quoted was devastating and seriously prejudicial to plaintiff's ability to adequately and thoroughly proceed with trial. The issues of the trial in themselves were allegations that the plaintiff had been persecuted through manifold sequences of acts by the Attorney

General. The above quoted act amidst trial served the purpose of actually instilling fear in the plaintiff that to successfully proceed with the case in itself held certain inherent dangers to the plaintiff.

2. It cannot be refuted that the act was in fact orchestrated by the office of the Attorney General. While a signature complainant appeared on the warrant, it is noteworthy to establish that it was one of a proved informant of and collaborator to the Attorney General.

3. Accordingly, at the end of the first day's trial, when most trial lawyers or counsel to a party would be preparing for the next days trial, this plaintiff was required to be arrested, hauled to a state police outpost, fingerprinted, booked, and then presented before a rural magistrate. This process entirely consumed plaintiff from the time of walking out of the courthouse until midnight of that day.

4. In addition to the traumatic and devastating affect it had upon the plaintiff, it was totally meritless. After finally being presented before a magistrate, the matter was instantly dismissed.

5. Appellant herein submits that no "seasoned trial lawyer" would be able to positively proceed in trial had he been entreated to such tactics, let alone this pro se plaintiff, who obviously had been intimidated by the possible affects of "suing the Attorney General of the State of New York."

6. Appellant holds that the inability to spend the evening concluding the first day of trial in proper preparation; coupled with the resulting fear, nervousness and trauma concerning the possible retaliation which could come from succeeding in trial, materially and significantly destroyed plaintiffs opportunity for a fair trial.

Was the implementation of a directed
verdict consistent with the rules
governing its application?

Was the Implementation of a Directed Verdict
Consistent With the Rules Governing its Application?

To lay a foundation to examine the above question, initially one should consider "the effect" of such a motion. In doing so, plaintiff-appellant invites the Court's attention to the several general guidelines which are applicable. Quoted herein from Corpus Juris Secundum is the appropriate section dealing with "Directed Verdict - Effect of:"

88 C.J.S. 255

"By moving for a directed verdict, the maker of the motion admits, for purposes thereof, the truth or credibility of whatever competent or material evidence he himself or the opposing party has introduced, and, indeed, all of the material and relevant evidence, or all of the opposing evidence, or evidence on behalf of the adverse party, or facts stated in the evidence adduced."

"The movant, by making the motion, admits, for the purposes thereof, the truth not only of all that the testimony proves, but of every material or ultimate fact which it proves, or tends to prove, in the slightest degree, together with all fair, reasonable, or legitimate inferences or conclusions favorable to the adverse party." (88 C.J.S. 255 emphasis added.)

Application of the above common law principles should have in itself, precluded any possibility of a directed verdict in this instant case. There could be no question that there was testimony and evidence supporting an invasion of the constitutional rights of the plaintiff. Two witnesses had testified of having been eye witnesses to an unlawful search.

Additionally, the Court admitted that this was a "disputed fact" in the trial. (See trial transcript, page 594, line 15.) The admission by the Trial Judge that the question of unlawful search was a disputed fact, should have in itself, precluded a directed verdict, and compelled the case to be presented for jury deliberation.

Obvious then is the the plaintiff was given trial by the Court, and not trial by "jury" as he should have been afforded. Long established doctrine sets forth that weighing the aspects of witness credibility, etc., is the function of the jury. Additionally, resolving the disputed fact of unlawful search should have been the function of the jury - not Judge Foley.

I

A PRIMA FACIE CASE PROVING LOSS OF CONSTITUTIONAL RIGHTS WAS ESTABLISHED.

1. In and during trial, plaintiff well established and proved; and nothing was ever introduced to controvert that plaintiff had been entreated to an entire sequence of events which deprived plaintiff of his constitutional rights.

a. Testimony of two eyewitnesses to seeing an unlawful search of plaintiff's business conducted by agents of the defendant. (See testimony of Boris Wainio, Page 204, line 7 through Page 206, line 2. Also see testimony Kenneth Klejbuk, Page 329, line 12

through Page 331, line 2.)

b. Testimony of defendant's agent that he prepared and executed a document to seize and impound plaintiff's records, business and personal; such being in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. (See testimony of George A. Cushing, Page 257, line 12 through page 258, line 12; See page 259, line 15, through page 260, line 11; See Page 262, line 22 through page 264 line 1.

c. Testimony of defendant's agent that he had in fact "caused" the seizure of certain of plaintiff's property, both personal and business. (See testimony George Cushing, Page 275, line 1 through Page 278, line 13; also see page 279, line 8 through 23. See also page 284, line 21 through 285, line 1.)

d. Testimony of defendant's agent who in fact "physically" took plaintiff's records and seized them. (See testimony of John Neuberger, page 364, line 1, through page 368, line 3.)

e. Evidence of the unlawful instrument used to seize the plaintiffs personal and business records. (See plaintiff's exhibit 7).

f. Presentment of two documents which both constituted unreasonable and violative searches of plaintiff's business. (See exhibits 5 & 6).

g. Testimony of I.R.S. agent that defendant did give false information, purposefully to the I.R.S. concerning plaintiff; such proving both harassment and that defendant went outside the scope of his duties and responsibilities in "bad faith". (See testimony of Barbara Herdman, Page 452, line 23, through page 454, line 9.)

h. Testimony of defendant's agent as to his unlawful obtainment of plaintiff's appointment books, thus denying plaintiff's rights under the Fourteenth Amendment to the U.S. Constitution to act against the seizure and plead a case of "confidentiality". (See testimony John Neuberger, page 368, line 7, through page 369, line 20.) (See also testimony of George Cushing, page 287, line 15, through line 21.)

i. Testimony of Defendant's agents as to the personal knowledge and personal participation of Louis J. Lefkowitz in the matters dealing with the plaintiff herein.

NOTE: Certain portions of the transcript is quoted herein because it is of vital importance to show that Louis Lefkowitz personally participated in a portion of the actions complained of. He had personal knowledge and was in full charge of the handling of the case before his agents fraudulently provided false information to the I.R.S. which is an act outside the scope of his duties and responsibilities.

TESTIMONY OF FRANK PANTALONE, Assistant
Attorney General and Bureau Chief. Transcript,
Page 574, line 6:

A. Well, because I received a telephone call personally from the Attorney General in New York City.

Q. What was his mood?

A. Well, he was very angry at the publicity generated by the letter, and he wanted to know, "What the hell is going on in Albany?" And he also wanted to know if I had read the Times and, further, whether or not in fact I had an investigation going on Therapeutic Hypnosis.

Q. Did he indicate that he wanted to be kept abreast of the matter in the future? (Emphasis added)

A. He wanted an immediate report from me, so on that date, March 5, 1975, I prepared a 3-page memorandum summarizing all of the facts relating to the case and my knowledge."

PANTALONE - continuing on page 575:

Q. Did he order you to do anything else in connection with the investigation?

A. Yes, he did, he -- following receipt of my memorandum and being apprised of the facts in the case, again by telephone call, he directed that all of the -- that the case be -- the case file be gone through and that all the facts relating to complaints of unlawful practice of medicine be referred to his Education Bureau, (emph. added) and Mr. Nack in charge of his Education Bureau (emph. added), he also directed that all of the evidence and evidentiary material relating to alleged violations of the Tax Law and Labor Law be referred to an appropriate state agencies for their action.

Q. Did he in essence order you to cooperate with all government agencies?

A. Yes, he did. And, in addition, with respect to the civil aspect of the case, which was in our jurisdiction, he directed that we proceed to prepare an appropriate Petition, Affidavits, and Exhibits, and a Section 63 proceeding.

The above elucidates a chronology of interchanges between Louis J. Lefkowitz and his staff concerning this plaintiff. In addition to obviously proving his personal knowledge and participation in the case prior to his departments promulgation of fraudulent and false information to the I.R.S. about the plaintiff; it also seriously raises certain aspects of good faith belief as to Louis Lefkowitz personally. Cogently put, they are as follows:

1. Evidence proved at trial Louis Lefkowitz, through his agents had been investigating the plaintiff (or allegedly so) for more than fifteen months.

2. Evidence proved in trial will indicate that continually the plaintiff sought a resolution and definition of the actions of the Attorney General.

3. After fifteen months of continually promulgating the statement that the plaintiff was "under investigation by the Attorney General", plaintiff purchased a half-page ad in the New York Times to complain that such continued activity resulted in an abuse of executive power.

4. Within twenty-four hours after the ad appeared, evidence proved that Louis Lefkowitz was "very angry at the publicity generated by the letter, and he wanted to know, "What the hell is going on in Albany". Within that twenty-four hour period he had two telephone conversations and on the second, personally directed a covey of acts and directions for his staff to proceed against the plaintiff herein.

5. In the least alternative, a jury should be permitted to weigh the question of whether the immediate legal actions against the plaintiff were "the result of investigations" or; a result of anger and retaliation against the plaintiff due to the ad.

NOTE: Directions were given by Lefkowitz to proceed on March 6, 1975. Criminal matters were not brought to the Grand Jury until May 31, 1975. (Here the plaintiff herein was fully acquitted.) Civil litigation was not instituted until August 27, 1975. Plaintiff submits that the long time lapse between the "order to prosecute" and the commencement of it, actually, was enveloped by fraudulently manufacturing a case against the plaintiff.

NOTE: It is not the intention of the appellant herein to "re-try" the issues past, or even to say that an abuse of the plaintiff came from the prosecution, but rather to further set forth for examination, the "motives" of the defendant herein.

II

AT THE POINT OF MOTION, GOOD FAITH-BELIEF SHOULD NOT HAVE BEEN CONSIDERED.

1. It becomes apparent from reading the court's decision, that Judge Foley chose to personally weigh and decide the question of "good faith belief". This was in error. It should not have been the function of the Court, in a jury trial, to decide the question of good faith belief, thus precluding jury deliberation on the case. Rather, if it was that a defense of good faith belief should have been considered, it should have been given to the jury to decide. Such action by the court clearly preempted plaintiffs right to a trial by jury. The Court's decision is abundantly clear that this function was exercised by the judge, and as such, the Court erred in its exercise of discretion, accordingly, denied plaintiff a fair trial.

III

ANY DEGREE OF GOOD FAITH - BELIEF COULD NOT HAVE BEEN PRESENT DURING THE TRIAL.

1. Good faith-belief cannot be established "by proxy".
2. Defendant's counsel went to great lengths to establish in trial that this was a case against "Louis Lefkowitz", and that any actions proved were of his subordinates and that he was not to be held responsible for them.

3. While the plaintiff contested this allegation, and submitted that Louis Lefkowitz does hold a responsibility for those persons who are empowered to act for him as "Assistant Attorney Generals"; plaintiff further went on to prove unquestionably, the personal knowledge of Louis Lefkowitz, as well as his supervision and direction of the matters relating to the plaintiff herein - "well before the commission of certain acts such as the providing the I. R. S. with fraudulent and false information concerning the plaintiff. Accordingly, the matter of the mind and attitude of Louis Lefkowitz personally was at issue in trial.

4. Considering the above it becomes obvious that evidence was present to assert "bad-faith" by Louis Lefkowitz. Such evidence and the mind and mentality of Louis Lefkowitz cannot be set forth by proxy in and through three of his assistants. At no time in the trial did Louis Lefkowitz appear and tender any testimony asserting good faith. Any testimony from any person other than Louis Lefkowitz is unacceptable as proof of the mind and mentality; as well as attitude of Louis Lefkowitz towards the plaintiff herein. Again, good faith-belief, cannot be established, "by proxy".

NOTE: Unquestionably, the case of Scheur v Rhodes 416 U.S. 232 (1974) has become the guideline for trials under 42 U.S.C. 1983. Both parties herein have often quoted Scheur v Rhodes to give precedent to matters

before the court. In reviewing this case, the Supreme Court clearly held that state officials in executive positions may be held liable for the acts of their subordinates. Of course, the Supreme Court went on to clarify the standards and criterion on proof necessary to sustain such a cause of action. Here was a case wherein the Supreme Court held that the highest state official - to wit the Governor of the State of Ohio, must proceed in trial to defend against the allegations of the plaintiff.

More importantly is that at and during the jury trial in the case of *Scheur v Rhodes*, the defendant personally appeared and personally testified as to his good faith. This personal testimony of Governor James A. Rhodes was deemed vital to the defense in the conduct of the jury trial.

In the instant case at hand, the defendant did not choose to appear and testify. Accordingly, no good-faith belief defense, can by proxy be placed before the court for him. Personal knowledge and supervision had been proved, in and through his own witnesses. Facts had been established which directly linked Louis Lefkowitz to the matters which evolved concerning the plaintiff.

Accordingly, the silence of the defendant, in the face of evidence opposing him, negates a possible good faith - belief defense.

Appellee's Brief is Mis-directed

Appellee's Brief is Mis-directed

Appellant-plaintiff submits that Appellee-defendant's brief is misdirected and does not come to grips with the basic issues now under review before this court. This is true for the following reasons:

1. It completely ignores and does not deal with any of the procedural errors which occurred during trial.
2. It is entirely devoted to advancing a theory that "the end excuses the means".

Reviewing appellee's brief as well as studying the trial transcript will show that the entire defense has been a tactic of showing that charges subsequently were instigated against the plaintiff, and, accordingly, because of this, the defendant should be held immune from the responsibilities of the unlawful acts previously committed. This exact position was stated to the court by defendant's counsel. (See trial transcript, Page 487, line 16, through Page 494, line 20.)

Appellee-defendant's brief filed herein is a total and full effort to accomplish two things:

1. Establish that plaintiff was an evil person and to assault his character and person.
2. Allege that to proceed against him should excuse

Louis Lefkowitz from any unlawful acts committed
in the course of business and grant him immunity.

There can be no conclusion other than that the Attorney General of the State of New York believes that "the end excuses the means". Plaintiff submits that if such a philosophy is permitted to stand, then it truly marks the end of justice through law, and renders all courts impotent to protect individuals in their constitutional entitlements.

CONCLUSION

Considering all of the judicial errors in the case at hand - both procedurally and as to the facts and evidence, plaintiff herein requests that the Judgment of the U.S. District Court for the Northern District of New York, dated November 19, 1976 be reversed and that the matter be returned to the District Court for a new trial on the issues, by jury, pursuant to the Federal Rules of Civil Procedure.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES D. MCMILLEN,

Plaintiff-Appellant,

NO. 77-7027

vs

LOUIS J. LEFKOWITZ, et al,

AFFIDAVIT OF
SERVICE

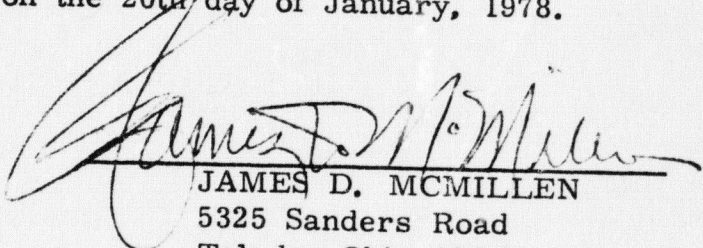
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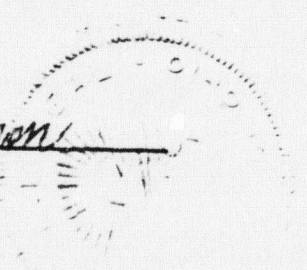
STATE OF OHIO)
) ss:
COUNTY OF LUCAS)

JAMES D. MCMILLEN, being duly sworn, deposes and says that he has served three copies of his Reply Brief in the above referenced case upon the Appellee by depositing same in the U.S. Mail and mailing same to LOUIS J. LEFKOWITZ, Attorney General of the State of New York, The Capitol, Albany, New York, 12224, (Michael Colligan of Counsel) on the 20th day of January, 1978.

DATED: 1/20/78

Sworn to and subscribed
before me this 20th day of
January, 1978.


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Mary F. Ensmann
Notary Public